

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

ADT LLC D/B/A ADT SECURITY)
SERVICES)

and)

INTERNATIONAL BROTHERHOOD)
OF ELECTRICAL WORKERS,)
LOCAL UNION 43.)

Cases 03-CA-184936
03-CA-192545

**RESPONDENT ADT'S REPLY BRIEF IN SUPPORT OF
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION AND IN
RESPONSE TO THE GENERAL COUNSEL'S CROSS EXCEPTION**

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Dated: October 27, 2017

ARGUMENT

Pursuant to Rule 102.46(h), Respondent ADT, LLC d/b/a ADT Security Services, Inc. (the “Respondent” or “ADT”) respectfully submits this reply brief in response to the answering brief of the General Counsel and the Charging Party to Respondent’s exceptions to the Decision of Administrative Law Judge (“ALJ”), Michael A. Rosas, dated August 4, 2017, and in response to the General Counsel’s cross-exception to the Decision of the ALJ.¹

I. The Charging Party and the General Counsel Fail to Defend the ALJ’s Finding that the Respondent Unilaterally Implemented a Six-Day Workweek in the Albany and Syracuse Units Which is Without Support in Law or Fact

A. The ALJ failed to recognize this case is a contract modification case

From its inception, this case has been a contract modification case. This is not a unilateral change case. Yet, the General Counsel argues that the ALJ properly found that the Respondent violated Sections 8(a)(5) and (1) of the Act under the clear and unmistakable waiver standard. (GC’s Response Brief at 2–6). Since the initial charge filed by the Charging Party (sometimes referred to as the “Union”) in Case 03-CA-184936, the Charging Party has alleged that the Respondent *abnegated the provisions of its labor agreement* regarding the duration of the workweek by implementing a six-day workweek in violation of Sections 8(a)(1), 8(a)(5) and 8(d) of the Act. (Initial Brief at 2; GC Ex. 1(a); GC Ex. 1(p)). A first, second and third amended charge

¹ References to the Respondent’s brief in support of its exceptions to the ALJ’s decision are designated as (Initial Brief at ____). References to the Charging Party’s answering brief to the Respondent’s initial brief are designated as (CP’s Response Brief at ____). References to the General Counsel’s answering brief to the Respondent’s initial brief are designated as (GC’s Response Brief at ____). References to the General Counsel’s brief in support of its cross-exception to the ALJ’s decision are designated as (GC’s Exception Brief at ____). References to the ALJ’s Decision are designated as (ALJD ____). References to the transcript of proceedings are designated as (Tr. ____). References to the General Counsel Exhibits are designated as (GC Ex. ____). References to Union Exhibits are designated as (U. Ex. ____). References to Joint Exhibits are designated as (Jt. Ex. ____).

in Case 03-CA-184936 were subsequently filed by the Union with the third amended charge alleging the Respondent violated the Act by *abnegating the provisions of its labor agreement* regarding the duration of the workweek by implementing a six-day workweek. (Initial Brief at 2–3; GC Ex. 1(c), 1(e), 1(g)). In her opening statement at the hearing, Counsel for the General Counsel stated, *inter alia*, “Respondent made unlawful *midterm modifications* to the collective bargaining agreements in violation of the Act.” (Tr. 14, emphasis added). In its cross-exception to the decision of the ALJ, the General Counsel excepts the ALJ’s omission of Section 8(d) in his findings, arguing the Board should correct the ALJ’s omission of Section 8(d) because the ALJ considered the language of the collective-bargaining agreements.” (GC’s Exceptions Brief at 6–7). The Charging Party does not contest, arguing throughout its response brief that “the only way to read the Decision is that the ALJ rejected the notion that there was even a sound arguable basis for the Respondent’s defense.” (CP’s Response Brief at 13 n.2). Accordingly, this is a contract interpretation dispute subject to the sound arguable basis standard.

B. The ALJ failed to apply the sound arguable basis standard to the record evidence

Contrary to the assertions of the General Counsel and the Charging Party, the ALJ completely disregarded Board precedent wherein the Board has refused to find a violation of Section 8(a)(5) and (1) on the grounds that the employer’s midterm change had a sound arguable basis in the contract. (ALJ 8–9). As in *NCR Corp.*, the Union’s disagreement with ADT’s reasonable interpretation of the labor agreements does not give rise to an unfair labor practice under Section 8(a)(5) or (1). *NCR Corp.*, 271 NLRB at 1213; *see also Atwood & Morrill Co.*, 289 NLRB 794, 795 (declining to determine “which of two equally plausible contract interpretations is correct”); *Monmouth Care Center*, 354 NLRB 11, 87 (2009) (adopting ALJ’s determination that “as long as Respondents have a ‘sound arguable basis’ for its interpretation of the contract, no

violation will be found”). Likewise, in *Phelps Dodge Magnet Wire Corporation*, the Board dismissed a complaint regarding an alleged violation of Section 8(a)(5) because “even though the Respondent’s construction of article 16.5 may have been erroneous, its interpretation had a sound arguable basis.” 346 NLRB 949, 952 (2006). The Board explained that in such circumstances the General Counsel fails to prove a violation. *Id.*

The General Counsel, however, asserts that the ALJ was correct in applying the “clear and unmistakable” waiver standard and, in its application of that standard, correctly found the Respondent in violation of Sections 8(a)(1) and (5) of the Act because the Respondent “put forth no evidence that the Union waived its right to bargain over the unilateral change to the employees’ work week” (GC’s Response Brief at 4). As stated in its initial brief, Respondent does not dispute that pursuant to *Katz* and its progeny an employer cannot make unilateral changes to terms and conditions of employment without first providing the union notice and an opportunity to bargain; however, Board law dictates that where the dispute is one of contract interpretation the Board will not find the respondent in violation of the Act where the respondent acted according to its sound arguable basis in the contract. *Compare NLRB v. Katz*, 369 U.S. 736, 743 (1962) and *e.g. Phelps Dodge Magnet Wire Corporation*, 346 NLRB 949, 952 (2006).

The General Counsel’s argument is disingenuous. “Respondent argues that the ALJ should have applied the ‘sound arguable basis’ standard to a question of whether Respondent unilaterally changed employees’ work schedules.” (GC’s Response Brief at 2). The point remains that there is no “unilateral change: analysis if there is a sound arguable basis for the Company’s interpretation of the contract. By trying to mish the two concepts together with its argument, the General Counsel is conflating the legal analysis. A legal analysis that the ALJ never undertook.

Moreover, the General Counsel's assertion that this case is analogous to *Gaska Tape, Inc.*, 241 NLRB 686 (1979) is misplaced. In *Gaska Tape*, the employer cited to no contract language and argued that the union waived its right to bargain about the modified work schedule because it failed to request bargaining when it was put on notice of the change. *Id.* at 692–93. This is simply not the case here.

Not only did the ALJ disregard the relevant Board precedent, he failed to examine the issues related to the Respondent's interpretation of the contract at all. Neither the General Counsel nor the Charging Party submit any record evidence to dispute that fact. Instead, the General Counsel alleges that the "ALJ considered the language of the collective-bargaining agreements," citing to the ALJ's findings of fact wherein the ALJ recites the disputed language from the agreements and to the conclusions of law. The General Counsel points to nothing in the ALJ's decision wherein the ALJ actually considered the language in the agreements. Nor can he. The Charging Party purports, on the other hand, that the ALJ's "finding itself necessarily means that the reasons advanced by the [Respondent] either did not exist or were not in fact relied upon." (CP's Response Brief at 13). This is pure speculation.

The ALJ completely ignored the record evidence that ADT's decision to temporarily extend work schedules to include work on Saturdays within facilities with large backlogs was done in accordance with its reasonable interpretation of what was permissible under the applicable labor agreements. (Tr. 112). The ALJ failed to even cite the relevant sections of the labor agreements in his analysis, much less explain his rationale for ignoring them. As discussed more thoroughly in the Respondent's initial brief, ADT has established that it acted in accordance with its reasonable interpretation of what was permissible under the applicable labor agreements. ADT showed that pursuant to the Management Rights Provision (Article 1) of the Albany and Syracuse labor

agreements, and subject to other provisions of the agreements, ADT is vested with the authority, among other things, to assign and direct work, control operations, determine reasonable amount and quality of work needed, and change existing business practices. (Initial Brief at 13–14; Jt. Ex. 2, 3). Article 6, moreover, permits ADT to modify employee work schedules (as long as ADT provides advance notice of the change) and allows ADT to assign work at premium pay on scheduled days off, thus allowing the assignment of a sixth day of work. (Initial Brief at 13–14; Jt. Ex. 2, 3). ADT furthered this position by citing to testimony provided by the Charging Party’s Assistant Business Manager and President, Patrick Costello wherein Costello testified that Article 6 of the labor agreements permits ADT to assign work on a scheduled day off (the sixth day) and acknowledged that the labor agreements place no limit on the number of employees the Respondent can assign to overtime work. (Initial Brief at 15; Tr. 34–38, 61, 65). The ALJ completely ignored this evidence. Now, in an attempt to defend the ALJ’s complete disregard for this evidence, the Charging Party argues that Costello’s testimony that Article 6 permits the scheduling of work on a scheduled day off related only to the Syracuse bargaining unit. But, as recognized by the ALJ, “[t]he disputed scheduling provisions are set forth in identical versions of Article 6 in the Syracuse and Albany CBAs.” (ALJD 3).

The ALJ erred in failing to analyze ADT’s temporary implementation of a six-day workweek at its Albany and Syracuse locations without applying the sound arguable basis standard. The record evidence establishes there is no contract violation because ADT reasonably interpreted the contract to permit modification of employee schedules for work to be performed on Saturdays upon giving advance notice and there is no evidence of animus, bad faith, or intent to undermine the Union.

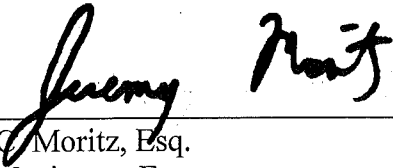
CONCLUSION

For all of the reasons set forth above and in Respondent's Opening Brief, the decision and recommended Order of the Administrative Law Judge should be reversed by the Board and the Complaint against Respondent should be dismissed in its entirety.

Dated: October 27, 2017

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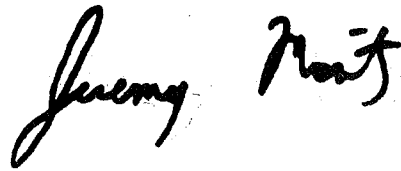
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CERTIFICATE OF SERVICE

I certify that on October 27, 2017, a copy of the foregoing ***RESPONDENT ADT'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION AND IN RESPONSE TO THE GENERAL COUNSEL'S CROSS EXCEPTION*** was Electronically Filed as a .pdf document via the NLRB's e-filing system and transmitted via e-mail to the following parties:

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